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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-_____

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ANTHONY CHARLES WILLIAMS,

PETITIONER

VS.

THE STATE OF TEXAS,

RESPONDENT

---

# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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ANTHONY CHARLES WILLIAMS
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VS.

THE STATE OF TEXAS
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PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS OF TEXAS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, entered on October 14, 1981.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at --S.W.2d--, No. 67,147, dated October 14, 1981, and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1237(3), petitioner having asserted below and asserts here the deprivation of rights secured by the Constitution of the United States.

The mandate of the Court of Criminal Appeals of Texas was issued on October 30, 1981. [Appendix B] No date for execution of the sentence has been set by the trial court. Petitioner's previously filed Motion for Stay of Execution addressed to this Court has not been acted upon.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. It also involves the following provisions of Texas law:

TEXAS CODE OF CRIMINAL PROCEDURE, ARTICLE 37.071.

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the Court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

TEXAS PENAL CODE, SEC. 19.02(a)(1).

MURDER. (a) A person commits an offense if he: (1) intentionally or knowingly causes the death of an individual.

TEXAS PENAL CODE, SEC. 19.03(a)(1) CAPITAL MURDER

(a) A person commits an offense if he commits murder as defined under Section 19.01(a)(1) of this Code and:

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping [and] robbery. . .

TEXAS PENAL CODE SECTION 12.31. CAPITAL FELONY.

(a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

## QUESTIONS PRESENTED

I

WHETHER THE JURY SELECTION AT PETITIONER'S TRIAL VIOLATED THE STANDARDS SET BY THIS COURT IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) AND ADAMS V. TEXAS, 488 U.S. 38 (1980).

II

WHETHER THE TRIAL COURT'S EXCLUSION OF PROSPECTIVE JURORS TILLMAN, CRINER, ANDERSON AND OLIGNEY UNDER THE INVALID STANDARDS OF SECTION 12.31(b) OF THE TEXAS PENAL CODE, VIOLATED THE CONSTITUTIONAL REQUIREMENTS OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) AND ADAMS V. TEXAS, 488 U.S. 38 (1980).

III

WHETHER THE RATIONALE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) WAS VIOLATED WHERE THE TRIAL COURT DENIED PETITIONER'S

CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR WAGNER, WHOSE VOIR DIRE RESPONSES CLEARLY REVEALED THAT (1) SHE WOULD IMPOSE THE DEATH PENALTY IN ALL CASES WHERE THE ACCUSED WAS CONVICTED OF CAPITAL MURDER, AND (2) SHE COULD NOT PROBATE A SENTENCE WHERE THE ACCUSED HAD BEEN CONVICTED OF MURDER.

IV

WHETHER THE PETITIONER'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND THIS COURT'S MANDATE IN LOCKETT V. OHIO, 438 U.S. 586 (1978), WERE VIOLATED WHERE THE TRIAL COURT FAILED TO DIRECT AND INSTRUCT THE JURY'S CONSIDERATION OF ALL MITIGATING CIRCUMSTANCES RAISED BY THE PETITIONER AT THE PUNISHMENT PHASE OF THE TRIAL.

V

WHETHER ARTICLE 37.071, VERNON'S ANN. CODE OF CRIMINAL PROCEDURE VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE HOLDING IN LOCKETT V. OHIO, 438 U.S. 586 (1978), BECAUSE IT CONTAINS NO PROVISIONS FOR DIRECTING AND INSTRUCTING THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES AT THE PUNISHMENT PHASE OF THE TRIAL, AND IS HEAVILY WEIGHED IN FAVOR OF THE STATE BY FOCUSING THE JURY'S CONSIDERATION ON THE AGGRAVATING CIRCUMSTANCES.

## STATEMENT

Petitioner was convicted of murdering Vickie Lynn Wright on June 12, 1978, by beating, hitting and striking her with a board and with his fists while in the course of committing and attempting to commit kidnapping and robbery. Represented by court-

appointed counsel, petitioner entered a plea of not guilty.

A jury in the 248th Judicial District Court of Harris County, Texas, found petitioner guilty and, by affirmative answers to the punishment issues, sentenced him to death.

Petitioner's appeal to the Court of Criminal Appeals of Texas was in forma pauperis and he was again represented by court-appointed counsel. His conviction and sentence of death were there affirmed by the opinion annexed as Appendix "A".

JURY SELECTION

Fifty-three prospective jurors were questioned. Eight people were excused because of their feelings about the death penalty (Serrano, R. 193-197; Reed, R. 198-206; Tillman, R. 370-394; Criner, R. 721-731; Hayward, R. 1071-1079; Askey, R. 1162-1165; Anderson, R. 1166-1176; and Oligney, R. 1272-1293), six were excused by agreement, and three were excused for other reasons. Petitioner used all fifteen of his strikes and the state used only nine.

Petitioner's court-appointed counsel objected to the court's rulings, sustaining the state's challenge for cause, to only three of the eight prospective jurors excused on the death penalty issue [Tillman, R. 370-394; Anderson, R. 1166-1176; and Oligney, R. 1272-1293].

Petitioner used his last peremptory strike against prospective juror Ernest Oldman, when his challenge for cause was denied. The Court refused his request for four additional strikes (R. 1492-1535).

Petitioner also challenged Alva Jean Wagner for cause. His challenge was denied and Ms. Wagner became the 12th juror. His request for an additional strike was denied. (R. 1569- 1616).

James Tillman did not believe in capital punishment. His conscientious scruples would prohibit him from ever participating along with eleven other jurors in returning a verdict which would ultimately cause the death of the defendant (R. 371).

The fact, however, that the only possible punishments for capital murder are life imprisonment or death would not affect

his deliberations on any particular point so as not to arrive at a verdict or "not certainly arrive at a verdict of death." (R. 372).

Tillman could answer the two punishment questions "yes" if proof was offered to convince him beyond a reasonable doubt that they should be answered affirmatively, even though he knew that such answers would require the Court to assess the death penalty, and even though he was opposed to capital punishment (R. 373-374).

After being thus qualified by the trial judge, Tillman told the prosecutor that he didn't feel like he could participate in a capital murder trial. He was a minister and he had been opposed to the death penalty ever since he knew about it. His opposition was based upon the "Scriptures." He believed that his religious feelings would keep him from "giving answers" to the punishment questions (R. 380-385).

Then when the prosecutor asked: "Do you think you might answer the [punishment] question 'no' just to make sure the Defendant did not receive the punishment of death, if you were on a jury such as this because of your religious beliefs?" Tillman responded: "Well, yes sir." (R. 386-387).

The prosecutor asked Tillman if he could think of any set of circumstances where his mind could be changed from the way that he felt now; could he think of any set of facts that would change his mind. Tillman replied: "Truly, Lawyer, I don't think there is any now." (R. 387).

After Tillman was challenged by the state, petitioner elicited the following responses from him:

> "Q . . . [I]f the evidence was there to satisfy you that the answer should be 'Yes,' could you and would you answer 'Yes,' knowing that it was the law and that the evidence was present to justify the answer?
>
> "A. Yes.
>
> "Q. . . . [C]ould you and would you answer those questions "Yes," knowing that the two "Yes"

answers were going to mean that the Judge would assess the death penalty? Could you and would you do that?"

"A. No. (R.390)

"Q. Regardless of what the evidence showed, you're going to answer one of them "No" so that the man won't get the death penalty; is that what you're telling us?

"A. I'm not saying that.

"Q. . . [E]xplain you answer for me.

"A. Well, my answer in my mind is this: I would rather not have anything to do with a thing that I know will cause death or capital punishment.

"Q. . . But what we're asking you is . . . could you follow the law if the evidence showed you and 11 other people that the answer to both of those questions should be "Yes"? Would you and could you answer both of them "Yes"?

"A. Yes, I could.

"Q. And this is true even though you knew that you (R. 391) and the 11 others had answered them "Yes," that when you did, the Judge would assess the death penalty in accordance with the law? I'm assuming that the evidence is very much there to justify your answer, okay? Could you and would you answer both of those questions "Yes"?

"A. I don't think so.

. . .

"THE COURT:. . . could you answer Question 1 and Question 2 "Yes" if the evidence was there to support a "Yes" answer, but you further understood that if you answered both "Yes," I was going to assess the punishment of death because that was the only choice I had? Could you answer "Yes" if the evidence supported it, realizing that the result would be death? (R. 392)

"A. Whether I could answer "Yes" and still be

against -- it would still be against my religious beliefs?

"THE COURT: That's the question we're asking. Some people say, 'Well, it's not me actually doing the assessing.' Some of them say, 'Well, wait a minute. If that's going to cause death, it's me doing it.' I'm not going to argue with whatever your mental thought patterns are, but I need to know from you whether or not you could answer both "Yes" if the evidence was there to support it, but you further realized that the fact that you answered them "Yes" would cause me by law to assess death? Can you answer them "Yes" if the evidence is there, knowing it would cause death to the Defendant, whoever the defendant might be?"

"A. Yes.

"THE COURT: You sure we're communicating?

"A. Yes.

"THE COURT: In other words, you can sit on a jury and you can answer both questions "Yes" if the evidence is there, knowing (R. 393) that that would cause the death of the Defendant?

"A. In other words, what I'm saying is this: I feel that if I should, knowing the death penalty stands subject - - . . . I said, I believe if I'm knowing that it's subject to the death penalty and I answer "Yes" to the questions, I feel myself that I'm encouraging the death penalty, which is completely against my belief or religion.

"THE COURT: Then would you automatically respond "No" to one of them to keep death from resulting, even though the evidence was to the contrary?

"A. Yes." (R. 394)

Petitioner objected to the Court's action in excusing Tillman for cause.

Ogeal Criner told the Court that she did not believe in capital punishment or that she could take something that she

could not give (R. 721). She did believe that anyone who is guilty "must be punished of his crime," but she really did not know whether or not she could answer "Yes" to the punishment questions; she had never had an opportunity to think about it like that (R. 723). If she thought the evidence was sufficient to warrant affirmative answers she "should imagine that [she] could and would" give such answers. It certainly would cause her conscience difficulty, but if it was necessary for her to say that anyone who is guilty of a crime must be punished -- but she had to deal with herself. She had to be sure that she didn't do anything that was going to cause her to relive this experience again. She didn't want to go through this again. So if she learned a lesson from it this time, then she wouldn't have to go repeat this experience. And this experience to her was just a little bit more than she could deal with at this time. She didn't think she could do "that." What she was trying to say is that she couldn't give -- life -- this is a God-given thing, and she didn't think anybody has the power to take something that you can't give. And this was the way that she felt and if she was responsible for this, then she, in some way, would be held responsible. What she was trying to say, maybe the Courtunderstood her religion. Her conscience would not let her answer "Yes" to the punishment questions even though the evidence required such an answer (R. 724-728).

Then the Court asked: "A prospective juror must be or shall be disqualified from serving as a juror unless he or she states under oath that a mandatory punishment of death or life imprisonment will not affect the deliberations on any issue of fact. Now, do you follow what I am saying there? . . . In other words, would you be able to set aside the fact that death would result and be able to answer the questions according to what the evidence shows, forgetting what your conscience dictates as to what your feeling is concerning death?"

"A. Well, I would just say that I wouldn't be able to do so.

"THE COURT: . . . And you feel absolutely

positive about that?

"A. Uh-huh.

"THE COURT: You feel that you would in fact permit your deliberations to be affected by knowing what the result was and act to the contrary of death?

"A. Yes, sir." (R. 728-729)

When Mrs. Criner was challenged by the state, Williams asked her the following:

"Q. . . . Are you telling Judge James that under no circumstances, even though a horrible case could you ever answer oath of those questions "Yes," even though the evidence overwhelmingly indicated that the answer should be "Yes"?

. . .

"A. Mr. Hinton, I still am saying to you that no matter how horrible the circumstances are, I really can't even imagine, but to me, I cannot, okay?

"Q. I'm not trying to give you a bad time; I'm just trying to make sure we're protected on the record, that you are truly disqualified. And I can understand how you feel and I appreciate it. That's all I have. Thank you (R. 730-731).

Mrs. Rosa Anderson did not believe in capital punishment. She didn't think that she could ever participate with 11 others in returning a verdict which would result in the death penalty (R. 1166-1167).

Her conscience would permit her, under no circumstances, to answer "Yes" to the punishment questions even if such answer was supported by the evidence (R. 1168).

Mrs. Anderson then told petitioner that, if she was really convinced that the punishment questions should be answered "Yes", she could do so (R. 1170-1171). Whatever evidence that satisfied her, she would say "Yes," but she didn't know for sure whether she would say "Yes" to both questions or not (R. 1172). She didn't think she could follow the law in that regard. She didn't really know if she would automatically vote "No" to one or

both of the questions even if the evidence called for a "Yes" answer (R. 1171).

When the Court took her again, Mrs. Anderson said that her conscience would not permit her to answer both questions "Yes." She "would automatically vote no simply because the result would be death and [she didn't] believe in death." (R. 1175-1176).

The Court granted the state's challenge for cause and petitioner objected (R. 1176).

Mary Oligney thought that, as a Catholic, she did not believe in death. She thought that prison would be much better (R. 1273). She did not think she would automatically vote "No" to the punishment questions to prevent the defendant from receiving the death penalty. She imagined that she could vote "Yes," realizing that the defendant would automatically get death, but she didn't know (R. 1275).

She guessed that her conscience would permit her to answer "Yes" knowing that would result in the death of the defendant (R. 1276). In the next breath, however, Mrs. Oligney didn't think she could vote "Yes," no matter how horrible the facts were (R. 1277). Under no circumstances could she vote "Yes" on both of the questions, knowing it would result in death (R. 1278).

After the state challenged for cause, Mrs. Oligney toldthe petitioner that if she and 11 of her fellow jurors determined from the evidence that the questions should be answered "Yes," she could do so, if she was satisfied in her mind that the answer should be "Yes." (R. 1279-1280).

Then Mrs. Oligney told the judge that her conscience would permit her to answer "Yes," knowing that the defendant would receive the death penalty, even though she was fundamentally opposed to the death penalty. She could do it in the right case (R. 1281).

In response to questions by the prosecutor, Mrs. Oligney thought that if he had the evidence, her answer to the questions would be "Yes." She did not think she could participate in a capital murder case and if the evidence proved to her the man was guilty of capital murder, return such a verdict (R. 1284). She

didn't think she could. She didn't know much about it so she didn't think she could. She didn't know very much about the laws (R. 1285). She would not change one of her answers if the evidence required a "Yes" verdict and answer "No" so that the defendant would receive a life sentence.

She explained that by "No," she meant no death penalty. That was the way she felt, regardless of what the facts showed her. Her answers to those questions would be affected. She thought she would be affected if she did say "Yes." (R.1288). She thought that would cause her to change her answers to either or both of the questions so that the defendant received life rather than death. She thought she would say "No" on death. She didn't think she could say he could have the death penalty. (R. 1289). She would probably say "No" because she didn't really believe in death (R. 1290-1291). The voir dire of this prospective juror was concluded with the following questions by the prosecutor:

> "Q. When you say, 'I probably would say no,' are you telling me you probably would answer one of the questions 'No'?
>
> "A. Yes.
>
> "Q. Can you imagine any fact situation where you would answer both questions 'Yes'? Can you imagine any facts or circumstances that would change your mind from that feeling or is that the way you feel regardless of the facts?
>
> "A. That's the way I feel.
>
> "Q. So if I were to give you a bad example of a horrible killing in a horrible murder case, are you telling me your answers to those questions would be the same regardless of what the facts would show you?
>
> "A. Well --

"Q. I'm not chiding you or quarreling with you, I'm just trying to --

"A. I would say no with the death.

"MR. HINTON: I'm sorry -- I'm --

"MR. MOEN: Judge, I think we would renew our challenge based on the responses.

"THE COURT: You've got it.

"MR. HINTON: Please note our objection under Witherspoon and 12.32B of the Penal Code, Whitmore v. the State in the Court of Criminal Appeals. . . [S]trike that citation. It's Florio vs.the State, Cause No. 54,084, opinion handed down July 12, 1978.

Ms. Alva Jean Wagner, who became juror number 12, when asked by the Court how she felt about capital punishment, replied: "Well, I'm for it." (R. 1570). In questioning her about her ability to consider probation where the accused has been convicted of "first degree murder," the Court gave the following state-oriented example, one step removed from the standard "mercy killing" example:

"Let's suppose that a man goes home one evening to discover that his home had been burned down, his wife and three children were killed in the fire, that it was done by an arsonist. He finds out who the arsonist is. He has time to coolly reflect on what he is going to do, and he decides that 'If I ever see that man, I'm going to kill him.' Thereafter, a week or two later, he sees him and does in fact kill him. Now, that might be a set of facts where you might be able to say -- as a matter of law, that is murder. Now, that might be a set of facts where the horrible things that the deceased has done to that man, maybe you could give him a probated sentence along with the other requirements. I'm not necessarily saying that you would. This is to give you an example how strange and how bizarre things can be. Do you think in the proper case you can give consideration to a probated sentence to someone you've convicted of first degree murder?" (R. 1574-1575).

Ms. Wagner replied, "Yes, sir, sure could."

When petitioner explored this issue, giving an example of a barroom killing, an intentional act of homicide, where the punishment was assessed at 10 years or less, Ms. Wagner's basic feelings were revealed:

"A. You mean to just let him go free, actually killed somebody?

. . .

"A. Well, are you asking if I would let someone go with a probated sentence for killing someone?

"Q. Yes, ma'am.

"A. No.

"Q. You are of the frame of mind and of the belief, as are many people, that if you are on a jury (R. 1605) and find a person guilty of criminal homicide, intentional criminal homicide, murder, that you are not going to consider the open -- the bottom range of punishment under Texas -- as Texas provides, that is, probation?

"A. That's right.

"Q. Under any circumstances?

"A. Well, I don't know -- well, under what? Under any circumstances would be -- but, just generally?

"Q. Okay, other than the case --

"A. I couldn't see letting somebody go that had actually killed someone, no.

. . .

"A. Well, now what he's [the Judge] talking about is -- I'm not saying that's right, a man loses his wife and children to some arsonist and he finds out who the person is and kills <u>them</u>; that's not right either, but I think I might be inclined to at least think about that. I can't sit here and say whether I would or would not.

But I might be inclined -- but, say a barroom brawl, you know, that's something kind of different. I don't think I would be inclined to let someone off. What would they be doing with a gun in the barroom anyway? (R. 1606).

"Q. THE COURT:. . .In the proper case, if you had heard all the evidence in the case -- now I'm not tying you down to the arson case or the barroom case. Use your own mind. Consider all the possibilities under which one man can take the life of another person. Now, considering that, can you give me an assurance or not -- and again, I don't care whichever it be, you let me know; but if you were to think of the case that most justifies it, could you consider giving probation?

"A. Yes, sir.

"THE COURT: In a case where you had convicted somebody of murder in the first degree?

"A. There could be instances, yes, <u>that I might be sympathetic toward them.</u>" (R. 1607-1608).

Ms. Wagner was equally emphatic in her initial views, and just as evasive in her secondary responses to the following issues:

She believed that she would be inclined to go ahead and find a defendant guilty of capital murder in an atrocious case even though the state failed to prove one of the essential elements that elevated the offense from murder to capital murder, Petitioner's example being a charge of capital murder committed during the commission of rape, where there is a reasonable doubt that a rape was committed (R. 1589-1590).

Rather than convict a defendant of the lesser offense of murder, where the facts show a vicious crime and there is overwhelming evidence of the homicide, Ms. Wagner indicated that she would find the defendant guilty of the higher offense, even though the evidence was insufficient to prove the aggravating

facts that made the offense capital murder. Her specific response was:

"I might be contradicting myself. I'm not sure, but it's very difficult. I've never understood all the legal aspects of getting people off, you know. So they commit something that is an atrocity, but for some legal reason, they don't get quite as much or they get off on parole or some such thing. I would be inclined, I'm afraid, to --" (R. 1592)

"Q. Get the higher offense?

"A. That's right.

"Q. Regardless of the evidence because of your feelings concerning the violent crime in our country. I assume?

"A. Yes." (R. 1593).

After appropriate answers were then massaged from Ms. Wagner by the trial judge, she concluded with this telling observation:

"I guess what I'm trying to say, I might have a tendency to want to do so [convict the defendant of the higher offense], but if the law says within certain guidelines, I may not like it, but I would go ahead, go according to the way the law --" (R. 1595).

Next, Ms. Wagner stated that she would "probably" have a tendency to assess the highest punishment if she found a defendant guilty of the highest crime at the guilt or innocence stage of the trial. She would answer the punishment questions in such a way that the Court would assess the maximum of death by injection (R. 1597-1598).

Then she gave the following specific responses:

"Q. . . . Do you feel that you would do that, having found a defendant guilty of the highest crime, assess the highest punishment?

"A. If I'm following you, yes, I think so.

"Q. This would be true regardless of the absence of evidence or at least the presence of sufficient evidence about 'probability'? In other words, you know that two "Yeses" equal death?

"A. Yes.

"Q. You have found a defendant guilty of the highest crime of capital murder. Having done that, do you feel as a person sitting on a jury, having found a defendant guilty of the highest offense, that it would then be your duty to assess the highest punishment?

"A. I think that's kind of hard to answer.

Before petitioner could follow up this ambiguous response the trial judge intervened and elicited superficially appropriate answers from this willing juror.

Ms. Wagner was examined as a prospective juror after petitioner had exhausted his fifteen peremptory challenges and after the Court had refused his request for additional strikes.

After the state accepted Ms. Wagner as a juror, and after she was sworn and had retired from the courtroom, petitioner made the following objection and request:

". . . [W]e respectfully come to the Court as lawyers for the accused and out of the presence of the 12 jurors so as to prevent possible prejudice against the accused and make the objection -- we respectfully submit that said juror [Wagner] should be excused for cause for the reason that the juror could not follow properly the law of lesser included offenses. And in an atrocious circumstances case, secondly, that (R. 1614) if the juror found a defendant guilty of capital murder, the juror would automatically lean toward the maximum penalty of death regardless of the evidence on Questions 1 and/or 2, and thirdly, the reason that the juror would lean toward a conviction in the absence of other evidence for the reason of age and age alone. And for all of those reasons, we submit the juror should be stricken for cause." (R. 1614-1615).

When this motion was denied, petitioner asked the Court for an additional peremptory challenge "to continue the voir dire (R. 1615). This last request was tantamount to an announcement by petitioner that Ms. Wagner was unacceptable to him and that if the Court granted him an additional strike he would exercise it on her.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW.

The jury selection issues were disposed of by the Court of Criminal Appeals as follows: "Based upon the record before us, we conclude that the aforementioned venire members [Criner, Tillman, Anderson and Oligney] were unable or unwilling to consider the statutory special issues with the degree of impartiality to which the State was entitled. . . The record adequately demonstrates that these venire members' views about capital punishment would have prevented or substantially impaired the performance of their duties as jurors in accordance with their instructions. Thus we conclude that the trial court did not err in excusing them for cause." [emphasis added]

As to juror Wagner, the Court below held: "It does not appear from the record that Wagner was unable or unwilling to follow the law in determining whether the appellant was guilty of the offense of capital murder. . . The voir dire examination of Wagner does not show that she would consider only the death penalty."

Petitioner's claims relating to the unconstitutionality of Article 37.071, Vernon's Ann. Code of Criminal Procedure for its failure to require the trial court to direct and instruct the jury's consideration of mitigating evidence, and the failure of the trial court to so instruct the jury, were disposed of as follows by the Court of Criminal Appeals:

> "It is the appellant's contention that a 'charge on all mitigating evidence at the punishment phase of a capital punishment trial is imperative if the jury is to give meaningful consideration to such evidence.' The appellant has failed to preserve the error now asserted on appeal. No objection to the court's charge or special requested instruction was filed. Articles 36.13 & 36.15 V.A.C.C.P. Absent such an objection or requested instruction, the trial court's failure to charge the jury as to the

consideration of mitigating circumstances was not reversible error."

## REASONS FOR GRANTING THE WRIT

Prospective jurors Tillman, Criner, Anderson and Oligney were excluded by the trial court on a broader basis than that applied in Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 488 U.S. 38 (1980). It is not apparent from their answers that these jurors were irrevocable opposed to capital punishment or that they would automatically vote against the imposition of death as the punishment in a proper case.

In Adams, supra, this Court used the "totality of the circumstances" test based upon the entire voir dire examination of the challenged prospective jurors and rejected the exclusion of otherwise qualified jurors predicated upon isolated responses elicited in answer to leading and suggestive questions by the trial judge and the prosecutor. See the voir dire of prospective jurors Dorothy Riddle (Adams R. 4928-4947) and George Ferguson (Adams R. 613-630).

Further, in the subject case, the trial court made no specific finding that the prospective jurors were being excluded for cause under Witherspoon independently of V.T.C.A. Penal Code, Sec. 12.31(b).

The exclusion of Mrs. Oligney was based upon responses closely analogous to those condemned by the Court in Maxwell v. Bishop, 398 U.S. 262 (1970). See Segura v. Patterson, 402 F. 2d 249 (10 Cir. 1971), rev'd, 403 U.S. 946 (1971); Funicello v. New Jersey, 52 N.J. 263, 245 A.2d 181 (1968), rev'd, 403 U.S. 948 (1971); Pemberton v. Ohio, 403 U.S. 947 (1971); Harris v. Texas, 403 U.S. 947 (1971). Adams clearly reiterated and emphasized the key Witherspoon phrases such as "unmistakably clear" (391 U.S. at 522, n. 21) and

"unambiguously" (id. at 516, n. 9) as the minimum constitutional standards applicable to the responses of prospective jurors excused for cause on the capital punishment issue.

The death penalty may not be imposed where the trial court, as here, sustains even one improper challenge for cause on the ground that the prospective juror opposes capital punishment. Davis v. Georgia, 429 U.S. 122 (1976).

The overall picture presented by the examination of Ms. Wagner is one of a person holding strong convictions that death is the only punishment she could consider for a person guilty of capital murder, and that life imprisonment is not adequate punishment and would not be considered. In additon, she would reject any lesser included offense in favor of the maximum offense at the guilt or innocence stage of the trial. Her mind was foreclosed to the consideration of probation in a murder conviction.

The trial court's action is refusing to exclude Ms. Wagner for cause directly violated the rationale of both Adams and Witherspoon. Just as the State has the "right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them" Witherspoon, 391 U.S. at 514; so the accused must have a countervailing right to exclude putative jurors who could not vote to impose a sentence of life imprisonment and who would refuse even to consider its imposition after finding an accused guilty of capital murder. Where, as here, the trial court refused to exclude a death-oriented juror after the petitioner had exhausted his peremptory challenges, and then refused to grant petitioner an additional challenge, the State has violated the Fifth, Sixth, Eighth and Fourteenth Amendments, and has crossed the line of fairness drawn by Witherspoon. The State has thus entrusted "the determination of whether a man should live or die to a tribunal organized to return a verdict of death." Witherspoon, 391 U.S. at 521.

This Court ruled, in Lockett v. Ohio, 438 U.S. 586 (1978), that, to meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors. See Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Roberts v. Louisiana, 431 U.S. 633 (1977).

Article 37.071, V.A.C.C.P., and the Texas case law, see, Jurek v. State, 428 U.S. 262 (1976), provide for the admission of any mitigating evidence that the individual trial judge deems relevant to sentence. Neither require submission of such mitigating evidence to the jury with direction and instruction that it may be considered in mitigation of punishment.

The only exception under Texas law is V.T.C.A. Penal Code, Sec. 8.04, which provides that, although voluntary intoxication does not constitute a defense to the commission of crime, evidence of temporary insanity caused by such intoxication may be introduced by the actor in mitigation of the penalty attached to the offense for which he is being tried. This statute specifically provides, Sec. 8.04(c) that "[when] temporary insanity is relied upon as a defense and the evidence tends to show that such insanity was caused by intoxication, the court shall charge the jury in accordance with the provisions of" Section 8.04.

Where there is evidence that the defendant was temporarily insane as a result of voluntary intoxicaton, the failure of the trial court to charge the jury in accordance with V.T.C.A. Penal Code, Sec. 8.04., is reversible error. Haag v. State, 223 S.W. 472 (Tex.Crim.App.1920); Cole v. State, 63 S.W.2d 702 (Tex.Crim.App.1933).

A similar charge on all mitigating evidence at the penalty stage of a capital murder trial is imperative if jury is to give any consideration to such evidence.

Even though the Court of Criminal Appeals, in Jurek v. State, listed "duress" as a possible mitigating factor to be considered at the punishment phase of the trial, V.T.C.A.

Penal Code, Section 8.05(a) specifically makes duress an affirmative defense to prosecution.

"Mitigation of punishment" under the Texas capital murder procedure has no real purpose save to give an air of constitutionality to the "aggravation of punishment" instructions given the jury at the punishment stage of the trial.

Thus, the following testimony presented by the petitioner at the punishment phase of the trial was delivered in a vacuum:

Petitioner's father testified that after petitioner was hit by an automobile in 1966 he "constantly kept complaining about headaches, and his coordination was bad, and [he was] just basically slow to catch on. . .[M]ost of the time he would get -- normally you would just say, go through with something, but most of the time he would just get confused with it and then you would have to let him stop and come back to it again. And this was basically the problem he's had ever since then." (R. 2032-2034).

Petitioner's mother said he was a slow learner. He had a lot of problems at school. He didn't understand very much and just didn't get along. He really needed a doctor. He really needed to feel like he's loved. (R. 2034-2036).

Ray Malonson, a self-employed trim contractor knew petitioner and his family. Petitioner was always pretty slow. With a little guidance he was motivated because Malonson did a lot of talking to him and encouraged him on, but he always seemed a little slow, like sort of holding back, real slow. (R. 2037-2039).

Oscar Foy, a home builder had known petitioner since 1963. When petitioner came out on the job with his father he was always respectful with and around Foy. He was real obedient, but seemed like he was easily persuaded. (R. 2043).

Annie Williams, an aunt, had know petitioner since he was a small child. He had always been "slow to catch on." He was still slow at the present time. (R. 2044-2055).

John Piper had known petitioner all his life. From his birth, he had two scars "side of his head." They kept him too

long in Jeff Davis [Hospital] when he was born. Then after that, petitioner had a bicycle wreck and "actually he's never been a child that seemed to catch ahold of nothing . . . [T]his bicycle did him in. . .he hasn't been himself since." An automobile ran over him in that wreck. R. 2046-2048).

Reverend Spellman had known petitioner since he was 2 or 3 years old. He didn't think petitioner "had the ability as others. [He] always felt like that possibly if [petitioner] had been given the correct supervision and the correct guidance, both spiritually and from his parents that he would have thought much better and been able to function much better." Petitioner had not come to Spellman's church since he was 12 years old. Spellman saved petitioner's life with prayer when he got run over. His parents were standing on the porch in shock, didn't know what to do. Nobody had any medical experience and all Spellman "knowed to apply was prayer." (R. 2051-2055).

Dr. Duard Bok, a court-appointed psychiatrist, found that petitioner was "borderline mentally retarded." There was no way anybody could say, with any degree of significant probability what petitioner's intentions were at the time he caused the death of the deceased. He told Bok that it was his definite intention to rob the deceased. It was Bok's "impression" that petitioner did not intend to kill the "lady," that petitioner was so slow and so mentally retarded that he didn't fully understand how hard he may have hit her or whatever other physical injuries he inflicted on her and the consequences of these. He told Bok he didn't intend to kill the girl. Bok did not "have any great expertise in non-psychiatric and non-psychology to accurately predict future acts of violence. (R. 2062-2067).

None of this mitigating evidence -- the only testimony presented by petitioner in an effort avoid the death penalty -- was submitted to the jury with appropriate instructions for its consideration.

By sanctioning the trial court's failure to instruct the

jury that mitigating evidence may be considered in determining the life and death questions inherent in the punishment special issues, the Court of Criminal Appeals of Texas emasculated the critical element upon which this Court sustained the constitutionality of the Texas capital punishment statutes in Jurek v. Texas, 428 U.S. 262 (1976), and thereby violated petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

The specific question presented by this case is whether a death penalty statute, previously upheld by this Court, may be applied in a manner that subverts the very premise upon which it constitutionality was sustained.

This Court's analysis of the Texas capital penalty statutes, in Jurek v. State, 428 U.S. 262 (1976), began with the pronouncement that "[A] sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held . . . to be required by the Eight and Fourteenth Amendments". . . A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. Thus, in order to meet the requirements of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances." 428 U.S. at 271.

The Court upheld the Georgia capital sentencing system because it "directs the jury to consider any mitigating factors." The Florida procedure was similarly sustained because it directed "the judge and advisory jury to consider certain enumerated mitigating circumstances." 428 U.S. at 272.

Finally, the Texas statutes " survived [Jurek's] Eighth and Fourteenth Amendment attack because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question -- despite its facial narrowness -- so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." Lockett

v. Ohio, 438 U.S. 586, 607 (1978).

In Lockett, this Court struck down a punishment statute which provided that "Once a defendant is found guilty of aggravated murder with at least one of seven specified aggravating circumstances, the death penalty must be imposed unless, considering 'the nature and circumstances of the offense and the history, character and condition of the offender" the sentencing judge determines that at least one of the specific statutory mitigating factors is established by a preponderance of the evidence. 438 U.S. at 607.

The plurality in Lockett held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604.

Both the Court of Criminal Appeals of Texas and this Court, in Jurek, reasoned that despite the facial narrowness of the Texas statutes, mitigating evidence could be adduced as bearing upon the global purview of the second punishment issue, i.e., whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Vernon's Ann. Code of Criminal Procedure, Article 37.071(b)(2).

That may be true in a given case. Petitioner, however, adduced testimony from Dr. Bok which bore directly upon punishment issue number one; whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. Vernon's Ann. Code of Criminal Procedure, Article 37.071(b)(1).

The jury's consideration of this testimony, assuming that there was such, on the issue of future dangerousness, would tilt the scales inexorably toward death, leading to a finding that, even though petitioner did not intend to kill his victim,

he would probably commit similar future acts of violence which, because of his mental retardation, would lead to other unintentional killings.

On the other hand, the jury was not directed to evaluate this mitigating testimony in considering whether petitioner's conduct in causing the death of the deceased was committed deliberately and with the reasonable expectation that her death or that of of another would result.

Without such direction and instruction, the mitigating evidence in this case could have been used against the petitioner and in favor of a "yes" answer to the future dangerousness issue. "Such a risk cannot be tolerated in a case in which the defendant's life is at stake." Beck v. Alabama, 447 U.S. 625, 637 (1980).

In Beck, the Court said, at page 638:

> "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedrual rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavialibility of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case." [emphasis added].

Thus the Alabama capital punishment scheme was declared unconstitutional because the trial judge was specifically prohibited from giving the jury the option of convicting the defendant of a lesser included offense. Instead, the jury could either convict the accused of the capital crime, in which case the death penalty was mandatory; acquit him, or refuse to return any verdict in a doubtful case, thereby requiring a mistrial.

The same defect is inherent in the Texas punishment procedure. Even though the jury hears mitigating evidence from an accused, just as the Alabama jury in Beck heard testimony at the guilt stage that while the defendant participated in the robbery of the deceased, he did not kill him and did not intend

his death, the Eighth and Fourteenth Amendments are violated if the trial judge fails to instruct the jury as to its use of such evidence.

The Court of Appeals of Texas has circumvented the broad premise upon which the Texas capital punishment statutes was upheld by this Court in Jurek, by refusing to require the trial courts to instruct the jury on its use of mitigating evidence. Petitioner's jury deliberated his fate solely on the "facial narrowness" of the statute and not upon the broad construction which provided the basis for this Court's approval of the Texas procedure.

The Texas court has consistently refused to define the role of mitigating evidence as it relates to the three punishment issues. No burden of proof on these circumstances has been established. No written instructions are required in submitting such evidence for a jury's determination.

In Quinones v. State, 592 S.W.2d 933 (Tex.Crim.App.1980) at the punishment phase of the trial, the accused asked that the jury be instructed that "Evidence presented in mitigation of the penalty may be considered should the jury desire, in determining the answer to any of the special issues." This request was denied and the trial judge submitted the special issues as prescribed in Article 37.071, Vernon's Ann. Code of Criminal Procedure, without explanation of their terms. The Court of Criminal Appeals found no error in this procedure, saying at page 947:

> "Appellant correctly claims a right to consideration of mitigating circumstances by the jury deciding whether or not to impose the death penalty and he argues that the explanatory charge he requested is necessary to protect that right. We disagree with this conclusion. . . Appellant was entitled to present evidence of any mitigating circumstances and did present such evidence, including a broad discussion of his personal and family background. The question then is whether the language of the special issue is so complex that an explanatory charge is necessary to keep the jury from disregarding the evidence properly before it. In King v. State, 553 S.W.2d 105 (Tex.Crim.App.1977), this Court held that the questions in Art. 37.071 used terms of common understanding which required no special definition. The jury can readily grasp the logical relevance of mitigating evidence to the issue of

whether there is a probability of future criminal acts of violence. No additional charge is required." [emphasis added]

In the King case, cited as authority for its holding, the Court of Criminal Appeals did not address the issue of charging the jury on its consideration of mitigating evidence at the penalty phase of the trial. Instead, King's claim was that the trial court erred in refusing, after timely request, to define for the jury at the punishment phase of the trial, the following words and phrases contained in Article 37.071, V.A.C.C.P.: "deliberately; probability; criminal acts of violence; and continuing threat to society."

The court ruled in King that these words and phrases were simple in themselves and were used in their ordinary meaning; jurors are supposed to know such common meaning and terms and under such circumstances such common words are not necessary to be defined in the jury charge. Thus the Court held that the trial judge need not provide special definitions for these terms in the jury charge during the punishment stage of a capital murder trial. 553 S.W.2d at 107.

The King rationale had no application to the more fundamental proposition that a jury must be given appropriate instructions if any evidentiary issue raised by the evidence is to be determined in accordance with the applicable law.

In petitioner's case, the Court of Criminal Appeals has applied the contemporaneous objection rule where no special instruction is requested, albeit ruling in Quinones, where an instruction was requested, that such a charge was not required because the jury could readily grasp the logical relevance of mitigating evidence to the issue of future dangerousness.

These holdings by the court below are untenable for several reasons. First, the "facial narrowness" of the Texas statute, as reflected in the trial court's penalty jury charge, attached as Appendix "C", belies the assumption that jurors will readily grasp, without instruction, the broad construction given the statute by both the Texas court and this Court in the

Jurek case. Second, "in death cases, doubts [regarding the adequacy of jury instructions to properly inform the jury in its consideration of mitigating evidence] should be resolved in favor of the accused. Anders v. United States, 333 U.S. 740, 752 (1948). Third, under the rationale of both Lockett and Beck, the petitioner had a right under the Eighth and Fourteenth Amendments to the jury's independent consideration of the mitigation evidence as it applied to both punishment issues after being properly instructed in accordance with the broad representations made by the Court of Criminal Appeals in the Jurek case and adopted without cavil by this Court.

## CONCLUSION

Petitioner prays that his petition for writ of certiorari be granted.

Respectfully submitted

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Dated: Houston, Texas
December 9, 1981

ANTHONY CHARLES WILLIAMS, Appellant

NO. 67,147 VS. - - - - - - Appeal From HARRIS County

THE STATE OF TEXAS, Appellee

OPINION

The appellant was found guilty of capital murder; the jury answered affirmatively special issues (1) and (2), Article 37.071(b) V.A.C.C.P., and accordingly the punishment was assessed at death. The sufficiency of the evidence at either the guilt or punishment phase of the trial is not challenged.

By his first ground of error the appellant contends that the trial court committed reversible error in excusing for cause Venire Members Tillman, Criner, Anderson and Oligney. He contends that these prospective jurors were excused in violation of the Sixth and Fourteenth Amendments as construed in Witherspoon v. Illinois, 391 U.S. 510 (1968). In examining the Texas procedure for selecting jurors in capital cases the Supreme Court of the United States recently stated:

> "[T]he general proposition [is] that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.
>
> " ... If the juror is to obey his oath and follow the law of Texas, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias. The State does not violate the Witherspoon doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality." Adams v. Texas, 448 U.S. ___, 100 S.Ct. 2521, 2526 (1980).

Based on the record before us, we conclude that the aforementioned venire members were unable or unwilling to consider the statutory special issues with the degree of impartiality to which the State was entitled.

APPENDIX "A"

Venire Member Tillman gave conflicting responses when asked whether under any circumstances he could answer the special punishment issues affirmatively. Although he initially stated that he could answer "Yes" if the issues were proved by the evidence, Tillman later stated that his religious beliefs would prevent him from answering the punishment questions. At the conclusion of his voir dire examination Tillman agreed that he would automatically respond "No" to one of the issues to prevent the appellant from receiving the death penalty even though the evidence was to the contrary.

Venire Member Criner informed the trial court that she did not believe in capital punishment. Criner further stated that no matter what the evidence might show she believed that she would vote "No" on at least one special issue to prevent the imposition of the death penalty. Criner expressed the belief that she could not answer both issues "Yes" no matter "how horrible the circumstances."

Venire Member Anderson stated that her conscience would not permit her "under any circumstances" to answer both issues "Yes." Anderson agreed that she would automatically vote "No" simply because she did not believe in the death penalty.

Venire Member Oligney also gave conflicting answers when asked whether she could answer the punishment issues affirmatively. Oligney initially stated that she "imagine[d]" that she could vote "Yes" to both issues, but she was not certain. Oligney subsequently concluded that she would probably answer "No" to at least one of the special issues "in spite of the evidence" because she did not believe in capital punishment.

The record adequately demonstrates that these venire members' views about capital punishment would have prevented or substantially impaired the performance of their duties as jurors in accordance with their instructions. Thus we conclude that the trial court did not err in excusing them for cause. The appellant's first ground of error is overruled.

By his second ground the appellant contends that the trial court committed reversible error in denying his challenge for cause to the twelfth juror selected, Alva Jean Wagner. Specifically the appellant asserts that the voir dire examination revealed that Wagner was not qualified to sit on the jury because: (1) she would be inclined in a case involving an "atrocious" murder to find the accused guilty of capital murder even though the evidence failed to establish the alleged aggravating circumstances, and (2) she would not consider life imprisonment for a defendant found guilty of capital murder.* We conclude that the appellant's contentions are without merit. Wagner specifically stated that although she "might have a tendency to want to do so" she would not convict an accused of capital murder simply because of the horror of the case. Wagner also stated that even though she "may not like it" she would follow the law and not convict an accused of capital murder unless the alleged aggravating circumstances had been proven. It does not appear from the record that Wagner was unable or unwilling to follow the law in determining whether the appellant was guilty of the offense of capital murder.

As to the claim that Wagner could not consider the full range of punishment, Wagner did admit that it probably would be her "tendency to assess the highest punishment" if the defendant was found "guilty of the highest crime at the guilt or innocence stage" of the trial. But Wagner never stated that she was incapable of considering life imprisonment as adequate punishment for a defendant guilty of capital murder. In fact Wagner informed the trial court that she would not answer the statutory issues "Yes" contrary to the evidence simply because

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* On appeal the appellant also contends that Wagner was not qualified because she could not probate a sentence where the accused had been convicted of murder. No objection on this ground was raised at trial; nothing is presented for review.

she believed that death was the appropriate penalty. The voir dire examination of Wagner does not show that she would consider only the death penalty. The appellant's second ground of error is overruled.

By his third ground the appellant contends that he "was denied a fair determination of the voluntariness of his written confession where the trial judge informed each prospective juror that a confession is inadmissible only if it is obtained by 'torture,'" The trial court gave the first juror selected the following explanation of the law relating to the admissibility of confessions:

> "Q All right. Let me go to the next problem that might arise. I don't know whether there is to be a confession in this case. There have been questions asked that indicate to me there may be, but again we're not talking about this case. I want to talk to you now about just any other case. Our law says that before a confession can be used by a jury to convict a defendant, that they must consider whether or not the confession was voluntarily given. In other words, if you believe that the confession was tortured out of somebody, you're not to consider the confession because understand tortured people may say or do anything. And even if you believe that it was true, but you believe that it was tortured, you're not to consider it. Could you set aside the confession and consider it for no purpose even though you believe it's true, if you thought it was coerced or forced out of a person?"

A similar explanation was given to the other eleven venire members selected to serve upon the jury.

No objection was made to the trial court's comments and thus nothing is presented for review. Woods v. State, 569 S.W.2d 900 (Tex.Cr.App. 1978). Further, the court's remarks to the jury were rendered harmless. Our review of the record reveals that there was no evidence before the jury raising the issue of voluntariness; the appellant did not testify or call any witnesses on the issue. At worst the trial court's statements merely misled the jury as to the appropriate standard for determining whether a confession was given voluntarily.

Since that issue was not before the jury, no harm resulted.

In the same ground of error, the appellant asserts that the "failure of [his] court-appointed counsel to object to this prejudicial instruction by the trial court deprived him of the effective assistance of counsel." The Constitution demands only reasonably effective counsel, not counsel that is error-free. The representation in this case was well within that standard. Further, counsel's failure to object to the court's remarks was harmless in light of the fact that the issue of voluntariness was not raised by the evidence. The appellant's third ground of error is overruled.

By his fourth ground the appellant contends that Article 37.071 V.A.C.C.P. violates the Sixth, Eighth, and Fourteenth Amendments "because it contains no provisions for directing and instructing the jury's consideration of mitigating circumstances at the punishment phase of the trial." It is the appellant's contention that a "charge on all mitigating evidence at the punishment phase of a capital murder trial is imperative if the jury is to give meaningful consideration to such evidence." The appellant has failed to preserve the error now asserted on appeal. No objection to the court's charge or special requested instruction was filed. Articles 36.14 & 36.15 V.A.C.C.P. Absent such an objection or requested instruction, the trial court's failure to charge the jury as to the consideration of mitigating circumstances was not reversible error. The appellant's ground of error is overruled.

By his final ground the appellant contends that evidence of unadjudicated, extraneous rape offenses admitted at the punishment phase of the trial "rendered the proceedings fundamentally unfair and deprived [him] of due process and equal protection of the law." This Court has previously held that, absent a showing of unfair surprise, proof of unadjudicated. extraneous offenses at the "sentencing proceeding" of a capital

case is admissible. Garcia v. State, 581 S.W.2d 168 (Tex.Cr. App. 1979). The appellant does not contend that he was unfairly surprised by the evidence now complained of on appeal. The appellant's ground of error is overruled.

The judgment is affirmed.

Roberts, Judge

DELIVERED: October 14, 1981

EN BANC

ANTHONY CHARLES WILLIAMS, Appellant

NO. 67,147 v. - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

After reading and examining with close scrutiny the entire voir dire examination of prospective jurors Tillman and Oligney,[1/] I have concluded that these two persons were not properly disqualified from serving as jurors in this capital murder case. This conclusion is buttressed by the Supreme Court's decisions of Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), and Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), as well as the Fifth Circuit's decisions of Burns v. Estelle, 626 F.2d 396 (1980); 592 F.2d 1297 (1979). See also Art. 37.071, V.A.C.C.P. Tillman and Oligney were improperly, challenged for cause by the State's prosecutor, and were improperly excused by the trial judge.

In Adams, supra, the Supreme Court used the "totality of the circumstances" test based upon the entire voir dire examination of the challenged prospective jurors and rejected the exclusion of otherwise qualified jurors predicated upon isolated responses elicited in answer to leading and suggestive questions by the trial judge and the prosecutor.

Here, the trial court did not make any specific findings that the prospective jurors were being excluded for cause under Witherspoon independently of or in conjunction with V.T.C.A. Penal Code, Sec. 12.31(b).

The exclusion of Mr. Tillman and Mrs. Oligney was based upon responses closely analogous to those condemned by the Supreme Court in Maxwell v. Bishop, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970); Segura v. Patterson, 403 U.S. 946, 29 L.Ed.2d 856, 91 S.Ct. 2280 (1971); Funicello v. New Jersey, 403 U.S. 948, 29 L.Ed.2d 859, 91 S.Ct. 2291 (1971); Harris v. Texas, 457 S.W.2d 903 (1970), 403 U.S. 947, 91 S.Ct. 2291, 29 L.Ed.2d 859 (1971).

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1/ See also the Appendix attached to this opinion.

Adams clearly reiterated and emphasized the key Witherspoon phrases such as "unmistakably clear" (391 U.S. at 522, n. 21) and "unambiguously" (id. at 516, n. 9) as the minimum constitutional standards applicable to the responses of prospective jurors excused for cause on the capital punishment issue.

The majority's simplistic approach to uphold the State's challenges for cause of Tillman and Oligney actually flies in the face of the mechanistic formulae this Court has in the past condemned.

On September 23, 1981, a majority of this Court adhered to the following comment:

> Addressing problems associated with an 'equivocating venireman' in Tezeno v. State, 484 S.W.2d 374, we stated:
>
> > We cannot believe that Witherspoon v. Illinois, supra, requires certain formal answers and none other. We surely feel that the test of Witherspoon is 'not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. (Vanderbilt v. State, No. 66,710, September 23, 1981).

Today, we truly adopt a "hypertechnical and archaic approach" when Tillman and Oligney are held to be properly challenged for cause by the prosecution and excused by the trial court. It is easily seen by the majority's opinion that the differences between the "equivocating juror" and the "vascillating juror" are not recognized by the majority and, for this reason, if no other, it errs.

The voir dire examination of the prospective jurors in this cause conformed to the following procedure: the trial judge first covered general considerations of the trial and of the voir dire, then he examined the venire members individually;[2/] this was followed by voir dire examination first by the State's attorney, then by defense counsel. Prior to this, the trial court had admonished the venire as a whole that "I would like for you to give [the death penalty] some thought prior to the time of you coming in here, so you can get it resolved as best you can. It's not an easy question to a lot of people." (Emphasis added.)

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2/ Cf. Art. 35.17(2), V.A.C.C.P.

Tillman and Oligney were "vacillating jurors." A "vacillating juror" is a venire member who first takes one position, then switches to the other, as to whether or not he or she can answer the special issue questions "yes," see Art. 37.071, V.A.C.C.P., even though he or she knows that such answers will result in the death penalty being imposed. An "equivocating" juror is a venire member who fails to take a firm position on the issue, answering, for example, "I think," or "I'm not sure." He or she is truly the "fence straddling juror."

The majority apparently believes that in instances of vacillation a prospective juror's final answer on the issue is controlling. However, I don't believe that is a proper test to disqualify a prospective juror under Adams and Witherspoon--merely because that juror answers a "magic question" correctly, at least not where that same juror has also stated just the opposite in response to previous questioning.

In this situation, I believe a venire member must repudiate any earlier, conflicting responses which would otherwise qualify that person under Witherspoon or Adams. Otherwise, the juror may simply be confused as to the meaning of the question. Since this type of confusion is frequently the cause of the venire member's vacillation, as I believe was the case in this cause, absolute repudiation of the juror's prior answers is necessary before that prospective juror can be successfully challenged for cause by the prosecution.

Although it may be true that where the trial court is confronted only with an "equivocating juror," "elements such as demeanor and tone of voice, etc., are important factors in conveying the precise message intended," see Granviel v. State, 552 S.W.2d 107 (1976), cert.denied, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977); Granviel v. State, 655 F.2d 673 (5th Cir. 1981), aff'd in part, rev'd in part; White v. State, 543 S.W.2d 104 (1976); Tezeno v. State, supra, a "vacillating juror" has demonstrated an opposite intent, not merely an

uncertainty, thus precluding a determination based on such factors and on what happens to be the venire member's last answer.

In order to disqualify a prospective juror under Witherspoon-Adams, I believe that person must give unequivocal and absolute answers, repudiating all prior contrary answers. The State must "show that because of the prospective juror's feelings against the death penalty he would be unable to answer the special issues without engaging in a 'conscious distortion' of the facts or law. When a juror engages in such conscious distortion, he ignores his instructions concerning the special issues, and violates his oath to render a true verdict according to the law and evidence." Pierson v. State, 614 S.W.2d 102 (1980). When a venire member states unequivocally that he can vote "yes" to the special issues, then later states that he cannot, but does not specifically and absolutely repudiate his previous affirmative statements, the State has not unambiguously shown that the venire member would engage in a "conscious distortion" of the facts or law. Unlike the "equivocating juror" situation, the State must get a specific and absolute repudiation from a "vacillating juror" of his previous conflicting statements in order to meet this burden.

Again, this occurs only when the prospective juror has given unequivocal statements that he or she could answer the special issues "yes." This clearly occurred here when Ms. Oligney stated that "if [she was] satisfied in [her] mind that the answers should in fact be "Yes," then [she] would follow the law and answer them "Yes," knowing what [her] answers would direct the Judge to do," and where Tillman answered "Yes" to the trial judge's question, "Can you answer [the special issues] 'Yes' if the evidence is there, knowing it would cause death to the Defendant, whoever the defendant might be?"

As I view the record, these prospective jurors have not finally stated absolutely and unequivocally that they would automatically, blindly, vote "No" to one of the special issues to avoid imposition of the death penalty, as I believe must be shown to disqualify a juror under the Witherspoon-Adams test.

> Only the most extreme and compelling prejudice against the death penalty, perhaps only or very nearly a resolve to vote against it blindly and in all circumstances, is cause to exclude a juror on Witherspoon grounds. A mere disbelief in it, or even 'conscientous or religious scruples, against its infliction will not suffice, since many people hold such views and some of these may yet be able to overcome them and abide by the law. (J. Gee in Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979).

It is quite obvious to me that Tillman and Oligney did not, from a "totality of the circumstances," give unequivocal and absolute answers sufficient to render them disqualified from serving as jurors in this capital murder case. Although this Court has opted for the rule that Witherspoon, supra, does not require certain formalistic answers from a prospective juror, to render that person disqualified, nevertheless, due to our unique procedure in prosecuting a capital murder cause, nothing less is demanded from an "equivocating" or "vacillating" juror. However, as noted, there is a difference between an "equivocating juror," a "vacillating juror," and a "confused juror," which I believe these persons were. My reading of the record does not show that they were adequately and sufficiently informed about our Texas death penalty procedure to render them to be totally disqualified from serving, at least not by the answers they gave. It is quite obvious to me that, from a "totality" of each voir dire examination, these persons intermixed their feelings towards the death penalty with their legal obligation to answer certain special issues. When this occurred, further and more detailed voir dire examination, than here, was mandated. Otherwise, we are back to the old days of pre-Witherspoon. By today's

decision any person who is labeled "an equivocating juror" cannot now serve on a capital murder jury in Texas. Regardless of one's beliefs towards the death penalty, if that person can honestly and truthfully answer the special issues submitted at the punishment hearing, see Art. 37.071, V.A.C.C.P., such person, as I view the above cases from the Supreme Court and the Fifth Circuit, is not disqualified from serving as a juror. Cf. O'Bryan v. State, 591 S.W.2d 464, 471 (1979).

To me, in light of Adams, supra, and see also Burns, supra, when a prospective juror says that he or she would be "affected" by their answers to the questions, this automatically triggers a necessity for the trial court to make further and more detailed inquiry into the jurors' concerns. As to what questions such person might be asked, in order for the "cold" record to reflect unequivocally and absolutely that that person has manifested the most extreme and compelling prejudice against the death penalty, to possibly the extent that he would answer the questions blindly and in the negative, this, of course, is within the purview of the trial court. See, however, Burns, supra, 592 F.2d at page 1301.

If individuals are to be prosecuted, convicted and assessed the death penalty in this State then, at the very minimum, those persons should have their causes judged by a jury of 12 persons who have been selected fairly and impartially by law as well as by the procedure mandated by the Legislature of this State. To ignore the obvious is not the same as to leap-frog the impossible, but simply to meet same head-on--which is all I am asking for by my dissent. Cf. White v. State, 543 S.W.2d 104 (1976).

The procedure and reason given for excusing Tillman and Oligney are reminiscent, if not a repeat, of pre-Witherspoon days in Texas. See Crain v. State, 485 S.W.2d 286; Quintana

v. State, 485 S.W.2d 281, Whan v. State, 485 S.W.2d 275; Harris v. State, 485 S.W.2d 284; Turner v. State, 485 S.W.2d 283; and Cherry v. State, 488 S.W.2d 744; Enriquez v. State, 429 S.W.2d 141; Ellison v. State, 419 S.W.2d 849; Pittman v. State, 434 S.W.2d 352; Scott v. State, 434 S.W.2d 678; and Bryan v. State, 406 S.W.2d 210, for examples.

To have a meaningful voir dire examination of a prospective juror, and to see by a cold naked record whether a prospective juror is disqualified, I submit the following meaningful minimum procedural outline which I believe is what our Legislature mandated when it enacted our death penalty statute. And which, by their decisions, the Supreme Court and the Fifth Circuit require.

1. The prospective juror is advised what the charge is.

2. The prospective juror is advised that he or she will first be called upon to decide the guilt or innocence of the accused, as to the main charge as well as any possible lesser included offenses;

3. The prospective juror is then advised that if he or she believes that the guilt of the defendant has been established, beyond a reasonable doubt, of the main charge, that is capital murder, then he or she is advised there will be a punishment hearing.

4. The prospective juror is then advised that if the defendant is found guilty of capital murder, then only two possible punishments will be applicable, death or imprisonment for life.

5. The juror should then be questioned as to whether this would affect his or her deliberations of any issue of fact that may be raised; be it at the guilt-innocence stage or at the punishment stage.

6. If the prospective juror satisfies Art. 12.31, C.C.P., and replies that the mandatory penalty of death or imprisonment for life will not affect his or her deliberations on any issue of fact, then the trial court goes next to number 7 infra.

7. The prospective juror is then told that under the law, if the defendant is found guilty of capital murder, there will be a punishment hearing, after which the trial court will give the jury certain questions to answer; the punishment to be assessed by the court depending on how the jury answers the questions.

> 8. The prospective juror is told the questions and, after ascertaining that the juror understands the questions and how the questions are to be answered; i.e., from the evidence presented by the State, beyond a reasonable doubt, then the prospective juror should then be asked again whether the mandatory penalty of death or imprisonment for life would affect his or her deliberations on the issues of fact to be submitted to the jury at the conclusion of the punishment hearing. 3/

Only until the cold naked record shows affirmatively and unequivocally that a prospective juror cannot serve because of the juror's beliefs against the death penalty, should a challenge for cause be sustained. In sum, it is the responsibility and duty of the trial court, not the prosecutor nor the defense attorney, 4/ to ascertain from the juror and show on the cold naked record that the juror has the most extreme and compelling prejudice against the death penalty, such that knowing that if he finds the defendant guilty of capital murder, one of the possible punishments may be death and this will affect him in his deliberations on the guilt or innocence of the accused to such an extent that he will blindly resolve the issue in such fashion that he will violate his oath of office as a juror if selected. Furthermore, it must be clearly shown on the record that this blind prejudice against the death penalty carried over to the punishment stage of the trial--to such a degree that the prospective juror cannot, because of his extreme and compelling prejudice against the death penalty, answer the questions that will be submitted pursuant to Art. 37.071, V.A.C.C.P. Less than this will not do to comply with Witherspoon-Adams, or Burns v. Estelle. The excusing of Tillman and Oligney fell below the minimum standard of due process and due course of law.

To continue on the treadmill of procedure a majority of this Court has adopted is, in my humble view, not to solicit the

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3/ It should be apparent and obvious to the reader that, contrary to the records and cases before this Court in the past, and pending before this Court at this time, my interpretation of post-Witherspoon and Adams' cases leads me to the conclusion that surface-wise, one's beliefs in the death penalty are irrelevant to whether one may serve as a juror in a capital murder case. I feel that this Court went astray a long time ago, see Brock v. State, 556 S.W.2d 309 (1977); cert denied, Brock v. Texas, 434 U.S. 1002, 54 L.Ed.2d 498, 98 S.Ct. 647 (1977), when it

Brethren in Washington or the Brethren in New Orleans or the Brethren who sit as Federal District Judges to tell us what is wrong with our procedure, but to quite frankly beg those Brethren to show us the guiding light of what is the correct procedure. And I predict that in the near future they will do so--to this Court's majority's chagrin, I might add.

The death penalty may not be imposed if even one prospective juror has been excluded in violation of Witherspoon. Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).

Accordingly, the cause should be reversed and remanded for a new trial, and not affirmed.

I respectfully dissent.

TEAGUE, Judge

Delivered October 14, 1981

En Banc

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footnote 3 continued --

refused to declare Art. 35.16(b)(1), V.A.C.C.P., null and void as being unconstitutional. Even at this late date, by failure to make that declaration, a prospective juror in Texas who has conscientous scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty, is still subject to a challenge for cause by the State. Until this statute is declared unconstitutional as being violative of Witherspoon, I fear that the Brethren in Washington and New Orleans will continue to set aside death penalty convictions from Texas, for the improper exclusion of prospective jurors.

4/ Cf. Ortega v. State, 462 S.W.2d 296, 303-304 (1970).

## APPENDIX

The relevant testimony of prospective juror Tillman is as follows:

Q (By the court): What is your feeling concerning capital punishment?

A: I don't believe in it.

Q: Do you have conscientious scruples that would prohibit you from ever participating, along with 11 other jurors, in returning a verdict which would ultimately cause the death of the Defendant?

A: I do.

Q: Are you telling me then that the mandatory penalty of death or imprisonment for life will affect or will not affect your deliberation on any fact issue? Do you understand what I'm saying?

A: Not exactly.

Q: The law says that a prospective juror must be able to find--say whether he would or wouldn't; in this case, the fact that life or death would be the only possible two punishments. You follow what I'm saying?

A: Yes.

Q: If those were the only possible punishments, and knowing that that was the range of punishment, would that affect your deliberations on any particular point so as not to arrive at a verdict of death?

A: No, sir.

Q: It would not affect it?

A: No, sir.

Q: It would not affect it?

A: Not affect it.

Q: You would then be able to look at the facts, and knowing that if you answered the two questions "yes", it would result in death, you still could answer the questions "Yes"?

A: I don't think so.

(The court then had Tillman read the two special questions, and Tillman indicated that he understood them.)

Q: Now, if proof was offered to convince you beyond a reasonable doubt that the response to those two questions should be "Yes", but you further understood that in the event you answered those "Yes," that I would be required to assess a punishment of death, could you answer them "Yes"?

A: Yes.

Q: Do you fully understand what I'm saying?

A: (Nodding affirmatively.)

Q: You're opposed to capital punishment, right?

A: Yes.

Q: There are some people who say, "Okay, that's not my responsibility. I believe that if the evidence shows it, I can answer 'Yes', even knowing that the answer to 'Yes' to both of those questions would cause the defendant to die.

A: (Nodding affirmatively.)

Q: Now, think about this a minute and tell me what your feelings are for sure.

A: Well, I believe confidently that if the facts proved it, I would say yes.

Q: Even though realizing that the result would be death?

A: Yes.

* * *

(The court then addressed other issues to be presented in the trial.)

A (By the prosecutor): Reverend Tillman, how long have you had your feelings about the death penalty? How long have you felt that way?

A: Ever since I knew about it.

* * *

Q: How did you arrive at your decision about the death penalty?

A: I arrived at my decision from the Scriptures.

* * *

Q: Do you feel like, feeling the way you do about the death penalty, that you would be able to participate in a trial like this . . . I think you realize that Mr. Mosley and myself will be seeking the punishment of death in this case, actively seeking that punishment. And we will be asking the jury, based on all the evidence, if they find the Defendant guilty in this case, to return "Yes" answers to both of those questions which would in effect make the Judge then impose the sentence of death to this Defendant. Do you feel like you would be able to participate in such a trial based on the feelings that you have about the death penalty?

A: Well, I don't feel like I can.

Q: . . . Do you feel like, regardless of what the facts or circumstances might reveal in this case, that you would be unable to participate in this trial because of the possible punishment that the State would be asking for or the possible punishment you might be called upon to administer or at least participate in?

A: That is correct.

Q: Okay. And would your feeling be the same regardless of what the facts might show, regardless of what the evidence might reveal to you in spite of how horrible the case or the killing might be; you feel like nonetheless that wouldn't sway you from your belief that you have?

A: No, sir, I don't believe.

* * *

(The prosecutor then explained the special issue procedure again.)

A: Do you feel like you would be able to answer these questions "Yes" based on the evidence, having the evidence that you have about the death penalty, or do you feel like your answers might be affected because of--or would be affected because of your religious beliefs?

* * *

(Tillman appeared to not understand the question, and the prosecutor explained the special procedure again.)

Q: Do you feel like you would be able to participate in such a proceeding and be able to answer those questions "Yes," knowing that by doing that the Judge would have to sentence the Defendant to death? And the only reason I ask you that is because of what you told me your religious beliefs are.

* * *

(Defense objection sustained, to add "assuming the facts proved that the answers should be 'yes,' could he and would he vote 'yes' if the evidence was there.")

Q: You understand what I was talking to you about, Mr. Tillman?

A: I believe I do.

Q: Do you think that if you were called upon from the evidence--in other words, the evidence proved to you that your answers should be "Yes," do you feel like you can answer those questions "Yes," knowing that if you did and all the rest of the jurors answered Yes," that it would have the effect of making the Judge sentence the Defendant to the punishment of death? Do you think you could do that or do you feel like your religious beliefs would keep you from being able to do that?

A: I believe my religious belief would keep me from giving answers, yes.

A: . . . Do you think that you might answer one of those questions "No" even if you felt like from the evidence the answer should be "Yes"? Do you think you might answer the question "No" just to make sure the Defendant did not receive the punishment of death, if you were on a jury such as this because of your religious beliefs?

A: Well, yes sir.

Q: . . . Can you think of any set of circumstances where your mind would be changed from the way that you feel now? Can you think of any set of facts that would change your mind?

A: Truly, Lawyer, I don't think there is any now.

* * *

(Challenge for cause was now made, and defense counsel asked to pose a few questions.)

Q (By defense counsel): . . . Let's assume that you were sitting on a jury. You know there would be 11 other folks with you?

A: Yes, sir, I do.

Q: And that the evidence was overwhelming--not in this case, but in a make-believe case, that a defendant committed the offense of capital murder. So you and the 11 jurors go out, and you decide, yes, the evidence is

there, and you convict him. Then you come back in and the Judge asks you to answer these two questions. He doesn't ask the jury to actually sentence the man to death. He asks the jury to answer these two questions yes or no. No. 1 is [special issue is quoted]. If the evidence is already there, you've already found him guilty of capital murder. Could you and would you answer that question "Yes," if it was the law and it was the evidence with 11 other people; could you answer it "Yes"?

A: No.

Q: In other words, regardless of what the evidence showed, you would answer it "No" even though the evidence was overwhelming; is that what you're telling me, Reverend?

A: Well, I understand. The question in my mind--I may be wrong, but the question is in my mind whether or not it is life imprisonment or death.

* * *

(Question made and objected to.)

Q: What I was getting at, Reverend Tillman, is before the jury could answer "Yes," all 12 people have to agree. You see what I mean?

A: Yes, sir.

Q: But, my question to you is, if the evidence was there to satisfy you that the answer should be "Yes," could you and would you answer "Yes," knowing that it was the law and that the evidence was present to justify that answer?

A: Yes.

Q: . . . Even though you're basically against the death penalty, if you were seated on a jury, could you follow the law, and if the evidence justified "Yes" answers to both of those questions, could you and would you answer those questions "Yes," knowing that the two "Yes" answers were going to mean that the Judge would assess the death penalty? Could you and would you do that?

A: No.

Q: Regardless of what the evidence showed, you're going to answer one of them "No" so that the man won't get the death penalty; is that what you're telling us?

A: I'm not saying that.

Q: Go ahead, if you can, explain your answer for me.

A: Well, my answer in my mind is this: I would rather not have anything to do with a thing that I know will cause death or capital punishment.

Q: I understand, Reverend, and nobody wants to do this; I understand. Nobody really wants to return--say, "Yes," knowing it means death, but it is a civic duty and responsibility, if a person can follow the law. Now, some people have such deep-seated feelings that they just can't do it period. But what we're asking you is, and what the lawyers for both sides and Judge James wants to know is, could you follow the law if the evidence showed you and 11 other people that the answers to both of those questions should be "Yes"? Would you and could you answer both of them "Yes"?

A: Yes, I could.

Q: And this is true even though you knew that you and the 11 others had answered them "Yes," that when you did, the Judge would assess the death penalty in accordance with the law? I'm assuming that the evidence is very much there to justify your answer, okay? Could you and would you answer both of those questions "Yes"?

A: I don't think so.

* * *

Q (By the Court): . . . Could you answer Question 1 and 2 "Yes" if the evidence was there to support a "Yes" answer, but you further understood that if you answered both "Yes," I was going that was the punishment of death because that was the only choice I had? Could you answer "Yes" if the evidence supported it, realizing that the result would be death?

A: Whether I could answer "Yes" and still be against--it would still be against my religious beliefs?

Q: That's the question we're asking. Some people say, 'Well, it's not me actually doing the assessing.' Some of them say, 'Well, wait a minute. If that's going to cause death, it's me doing it.' I'm not going to argue with

whatever your mental thought patterns are, but I need to know from you whether or not you could answer both "Yes" if the evidence was there to support it, but you further realized that the fact that you answered them "Yes" would cause me by law to assess death? Can you answer them "Yes" if the evidence is there, knowing it would cause death to the Defendant, whoever the defendant might be?

A: Yes.

Q: You're sure we're communicating?

A: Yes.

Q: In other words, you can sit on a jury and you can answer both questions "Yes" if the evidence is there, knowing that that would cause the death of the Defendant?

* * *

A: I believe if I'm knowing that it's subject to the death penalty and I answer "Yes" to the questions, I feel myself that I'm encouraging the death penalty, which is completely against my belief or religion.

Q: Then would you automatically respond "No" to one of them to keep death from resulting, even though the evidence was to the contrary?

A: Yes.

(The challenge was then renewed and granted over objection.)

The relevant testimony of prospective juror Oligney was as follows:

Q (By the Court): Can you tell me how you feel about capital punishment where death results?

A: Well, I think that's to me as a Catholic, I don't believe in death. So I think that prison would be better.

* * *

(The Court then explained the trial and special procedures.)

(Ms. Oligney initially did not understand, and the Court then explained further.)

Q: Do you understand first of all that if a "Yes" answer appears to both of those questions, that the Defendant gets death?

A: Yes.

Q: Now if the evidence showed you at the hearing that the answers to these two questions ought to be "Yes"; there was plenty of evidence to support, you know, that you should say "Yes" to those questions, but further you realized that if you answered both of them "Yes" that the Defendant is going to get the death penalty, would you automatically vote "No" to one of them to avoid the Defendant getting the death penalty no matter what the evidence was?

A: No, I don't think so.

Q: Then could you vote "Yes" to both of them realizing that the Defendant would automatically get death?

A: I imagine so; I don't know.

Q: . . . Take a couple of minutes, make sure how you feel . . .

A: I don't think so.

Q: Let me reask the questions so I'm fully sure that you understand what I'm asking. First of all, if those two questions are answered "Yes", the Defendant gets death. Now, would your conscience permit you to answer "Yes" to both of them if the evidence was there to support "Yes" answers? Let's suppose your conscience thought, "Yeah, they should be answered 'Yes'; that's right, they should be. But, I know he's going to get death if I do." Would your conscience permit you to answer "Yes" knowing that would result in the death of the Defendant?

A: I guess so.

Q: Well, now, when you say "I guess so," I understand that probably means "Yes, I could." But, it also could mean, "Well, I'm not sure and maybe I wouldn't." So I have to find out for sure. So you tell me what your feelings are and any way it goes is fine.

A: No, I couldn't; I don't think I could.

Q: Okay, you don't think you could what? You don't think you could vote "Yes"?

A: No.

Q: No matter what the facts were?

A: (Nodding negatively.)

Q: Is that what you're telling me?

A: Yes.

Q: No matter how horrible the facts, no matter how much evidence there was to support it, then the realization that death would result in your two "Yes" answers would keep you from answering them "Yes"; is that what you're saying?

A: Yes.

Q: . . . So think about it; is that it?

A: Yes.

Q: Under no circumstances could you vote "Yes" on both of them because--knowing it would result in death; is that what you're telling me?

A: Yes.

* * *

(A challenge was now made, and defense counsel examined Ms. Oligney.)

Q (By defense counsel): . . . Let's go directly . . ., in a hypothetical fact situation just like a make-believe case, not this one, but just one where you were selected to sit on the jury and listen to the evidence in a capital murder case. And let's assume that it was a very horrible capital murder case where an elderly woman was raped and then beaten and shot and your jury that you were sitting on decided that without a doubt that that man should be found guilty. And then on that same capital murder case you were asked to listen to evidence to help you answer those two questions that the Judge has just been talking about with you. And the State put on evidence with regard to those two questions and presented you overwhelming evidence, and in your own mind and in your heart you formed the opinion that the answers to those two questions should be answered "Yes" based on that evidence that you had heard. Now, the Court had instructed you that if you answered each of those questions "Yes" then it would be the Court or the judge who would be bound to sentence that particular defendant to death. But, while you were sitting in that jury room, you and 11 of your fellow jurors decided in each of your respective minds that the answers to those two questions should in fact be "Yes." My question to you is, in that particular illustration, would you answer those questions "Yes" if the evidence called for "Yes" answers knowing the result of your answers?

A: Yes.

Q: All right, if you were satisfied in your mind that the answers should in fact be "Yes", then you would follow the law and answer them "Yes", knowing what your answers would direct the Judge to do?

A: Yes.

Q (By the Court): Let me make sure you understand where we are now because you've answered two ways, . . . Now, are you telling me by what you answered him just then that if you answered both questions "Yes"--that means death to a defendant, you understand? Now, are you telling me if the facts were horrible, bad, and you really felt like they ought to be answered "Yes," but would your conscience permit you to answer "Yes," knowing that the defendant would receive the death penalty?

A: Yes.

Q: You could do that?

Q: Uh-huh.

Q: Even though you're fundamentally opposed to the death penalty?

A: Yes.

Q: But, in the right case, you could do that, right?

A: Yes.

Q (By prosecutor): Mrs. Oligney, you gave two sets of answers now, and one you answered to the Judge earlier that you could not answer those questions "Yes" knowing that the death of a defendant would result. And the Judge asked you if that applied in all circumstances and you said yes, it did, that you could not answer the questions "Yes." You remember giving that response to the Judge?

A: Yes.

Q: Then [defense counsel] asked you about a specific hypothetical case, not the facts in this case, but talked to you about the rape of perhaps an elderly lady who was killed by the man who attacked her, and you said, well, in that particular type of case, if the evidence called for it, you could not only find the man guilty of capital murder, but answer both the questions "Yes." Did you understand what he was asking you, [defense counsel], when he talked to you?

A: Was that---

Q: Not about the facts in this case, but he was giving you an imaginary fact situation.

A: Uh-huh. It's confusing to me. I can't hardly understand it.

Q: That's why I wanted to check with you because you gave the Judge one answer; you told him you didn't think you could answer those questions "Yes" knowing that the death of the Defendant would result, and you told [defense counsel] in the imaginary case that he asked you about, an imaginary woman being killed by an imaginary attacker during the course of a rape, that you felt in that particular case you could at least answer the questions "Yes" if you felt like the evidence showed you your answers should be "Yes." Did you see the difference in those two answers there?

A: Yes, I think so.

Q: All I want to ask you is what are your-- . . . How do you feel now that you've had a chance to think about it, talk to His Honor, talk to the lawyers representing the Defendant, how do you feel about those two questions now and your answers to them?

A: Well, I think if you do have the evidence, it would be "Yes."

Q: Okay.

A: If you had enough evidence.

Q: So what you're telling me now or what you're telling the Court now, you could participate in a capital murder case. In other words, you could sit on a jury, and if the evidence proved to you the man was guilty of capital murder, you could return such a verdict?

A: I don't think so.

Q: You don't think you could?

A: No.

Q: Well, you see what kind of problem I have now because--

A: Yes, I see now.

Q: You've said a couple of different things. . . . I just want you to tell me what your feelings are and how you really believe and what your feelings are based on your beliefs as a human being, your religious beliefs, any moral convictions that you have, how do you feel?

A: Well, I don't think I could. I dont' know very much about it, so I don't think I could.

Q: Well, we have tried to explain here for last couple of minutes, and you say you don't think you could do it?

A: No.

Q: What do you mean when you say, "You don't think you could do it"?

A: Well, I don't know very much about the laws.

Q: Well, just about every person like yourself who comes in doesn't know anything about the law, and the Judge will explain it to you and he will give you all the law that applies in this case in writing at a later time.

* * *

Q: . . . Do you agree with the law or do you have a disagreement with the law about this type of case and what you would be required to do in this type of case? In other words, if you agree, fine; if you disagree, that's fine, too . . . Let me do this one more time, cover those two questions with you.

* * *

(Prosecutor explains special issues procedures again.)

Q: . . . If the evidence showed you that your answer to the questions should be "Yes," would your conscience allow you to answer "Yes," or would you change one of your answers and instead answer "No," so that the Defendant would receive a life sentence rather than a death sentence by the judge?

A: I would say no.

Q: No meaning what?

A: No, no death penalty.

Q: No death penalty?

A: Uh-huh.

Q: And is that the way you feel regardless of what the facts showed you?

A: Yes.

Q: I could talk to you about a horrible baby killing or a horrible killing about a woman

killed by her attacker or a person stabbed 3,000 times--I think we could all think of bad fact situations and horrible situations, but are you telling me that regardless of what the facts and circumstances might reveal to you that you would never answer both of those questions "Yes"?

A: I don't think I could say "Yes" to them.

Q: Okay. Are you telling me that your answers to those questions would be affected?

A: I think I would be affected if I did say yes.

Q: And do you think that would cause you to change your answers to either both the questions or one of the questions so that the Defendant receives life rather than death?

A: Yes.

Q: Are you sure on that? I don't want to have you agree with me or put words in your mouth. Are you positive about that?

A: I think I would say "No" on death.

Q: Then are you sure on that?

A: Yes.

Q: . . . I'm just trying to find out if what you're telling me is the way Mrs. Oligney feels right now.

A: That's the way I feel about the death penalty. I don't think I could say he could have the death penalty.

Q: Okay. But you know how the punishment of death gets assessed, and that's by answering those two questions over there on that board?

A: Uh-huh.

* * *

(The prosecutor poses more hypothetical situations.)

Q: . . . If you heard all the evidence and you believe that your answers to both questions should be "Yes" from the evidence, would your conscience--would your feelings about capital punishment that you told us about, would they allow you to answer both of those questions "Yes", knowing that if you answered the questions "Yes," the defendant would receive the punishment

of death or would your feelings and conscience make you answer the question "No," in spite of the evidence so that the defendant would receive the life sentence rather than the death sentence?

A: I would probably say no because really I don't believe in death.

Q: When you say, "I probably would say no," are you telling me you probably would answer one of the questions "No"?

A: Yes.

Q: Can you imagine any fact situation where you would answer both questions "Yes"? Can you imagine any facts or circumstances that would change your mind from that feeling or is that the way you feel regardless of the facts?

A: That's the way I feel.

Q: So if I were to give you a bad example of a horrible killing in a horrible murder case, are you telling me your answers to those questions would be the same regardless of what the facts would show you?

A: Well, I would say no with the death.

(The challenge was now renewed and granted over objection.)

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No 67,147 styled:

ANTHONY CHARLES WILLIAMS

VS.

STATE OF TEXAS

the judgment of the 248th. Judicial District Court of Harris County, Texas was AFFIRMED on October 14, 1981 and on October 30, 1981, the mandate of this Court issued.

Therefore with the Affirmance of the case and issuance of the Mandate, this cause was disposed of by this Court on October 30, 1981, the appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas, this the 23rd. day of November, A. D., 1981.

THOMAS LOWE, Clerk of the
Court of Criminal Appeals
of Texas

APPENDIX "B"

Best Copy Available

CAUSE NO. [illegible]

THE STATE OF TEXAS

VS.

[illegible]

[illegible]

Do you find from the evidence [illegible]

the degree [illegible]

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

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ANTHONY CHARLES WILLIAMS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

---

Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
Of Texas

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

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## QUESTIONS PRESENTED

I. WERE VENIREMEN EXCLUDED FROM PETITIONER'S TRIAL IN VIOLATION OF THE DOCTRINE OF WITHERSPOON V. ILLINOIS?

II. DID THE DENIAL OF PETITIONER'S CHALLENGE FOR CAUSE TO VENIREMAN WAGNER VIOLATE PETITIONER'S RIGHT TO AN IMPARTIAL TRIAL WHERE THE VENIREMAN TESTIFIED THAT SHE COULD CONSIDER THE FULL RANGE OF PUNISHMENT?

III. SHOULD THIS COURT CONSIDER A MATTER TO WHICH THE STATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW?

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NO. 81-5876

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

---

ANTHONY CHARLES WILLIAMS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

---

Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
Of Texas

---

RESPONDENT'S BRIEF IN OPPOSITION

---

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, delivered October 14, 1981, is reported at 622 S.W.2d 116 (Tex.Crim.App. 1981), Williams v. State, and is attached to the petition at Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Also involved is Article 37.071, Vernon's Ann. C. C. P.

## STATEMENT OF THE CASE

Petitioner was tried in September, 1978 for the kidnap-murder of thirteen-year-old Vickie Lynn Wright. See, V.T.C.A. Penal Code, Sec. 19.03. On June 12, 1978, Vickie went to a Houston bowling alley with her sister (SF 1670-1673). 1/ Later that evening, Vickie went outside to a friend's car to get some money, and never returned (SF 1678-1683). The car was missing also. Petitioner was observed later that evening recklessly driving the missing vehicle (SF 1719-1726, 1733-1737). Blood was observed on Petitioner's clothing and in the car (SF 1714-1716, 1727-1729). Due to information subsequently obtained, police arrested Petitioner the next day (SF 1750-1753). Vickie's partially nude body was found in some bushes; she had been beaten to death (SF 1740-1746). Petitioner after being fully advised of his rights, executed a lengthy confession to the offense, admitting that he had abducted and murdered the girl (SF 1861-1863, 2155). An examination of the body revealed that Vickie had been beaten to death on the head and chest, and seminal fluid was found in her mouth and rectum (SF 1891-1894). Additional evidence was offered which showed Petitioner to have been the murderer.

At the punishment phase of the trial, the evidence showed that around the time of Vickie's murder, Petitioner had abducted and brutally sexually assaulted four other women of varying ages (SF 1960-1969, 1970-1982, 1992-2007, 2010-2030). One of these women he shot in the face and left for dead (SF 1996-2007).

Petitioner presented evidence from relatives and acquaintances that he was "a little bit slow" and that they would

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1/ "SF" will refer to the state court records which contain a transcription of the testimony from Petitioner's trial.

attempt to help Petitioner become rehabilitated (SF 2032-2055). Additionally, Petitioner presented the testimony of a psychiatrist that he (Petitioner) may not have intended to murder his victim and that he was of low intelligence (SF 2055-2067). In rebuttal, the state presented the testimony of a psychologist that Petitioner was not mentally defective (SF 2092-2099).

## SUMMARY OF THE ARGUMENT

There are no special and important reasons for review of this case. The record does not support Petitioner's claims that four veniremen were excluded in violation of the doctrine of Witherspoon v. Illinois. Because after extensive examination, each voiced unequivocal and unambiguous resolve to automatically vote against the imposition of the death penalty no matter what the evidence revealed, each was properly excluded.

Petitioner's contention that venireman Weaver could not be a fair and impartial juror is not supported by the record. The record shows that Weaver could consider the entire range of punishment, including the minimum, and that she would follow the law in determining both guilt and punishment.

This Court should decline to consider a claim to which Petitioner made a procedural default by failing to raise the claim in accordance with state procedural law. Petitioner's objections to the jury charge were not presented to the trial court, as state law requires. Further, this Court previously has reviewed Petitioner's contention concerning the constitutionality of the Texas death penalty statute, and found it to be without merit.

## REASONS FOR DENYING THE WRIT

### I.

### THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists.

II.

NO VENIREMEN WERE EXCLUDED FROM PETITIONER'S TRIAL IN VIOLATION OF THE DOCTRINE OF WITHERSPOON V. ILLINOIS.

Petitioner's contention that four prospective jurors were excluded in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) is meritless, as the state court records will reveal. Further, as to one of the prospective jurors, Ogeal Criner, Petitioner failed to make a contemporaneous objection as required by state procedural law.

Venireman James Tillman did not believe in capital punishment and had scruples which would prevent him from returning a death verdict (SF 371). He could not look at the facts presented in a case and answer the statutory special issues [2/] "yes" knowing that that would result in the imposition of the death penalty. As a minister, he had preached against the death penalty many times (SF 380). He would be unable to participate in giving the death penalty (SF 382), regardless what the evidence might reveal and in spite of how horrible the case (SF 382-383). Even if the evidence proved to him that the special issues should be answered "yes," his religious beliefs would prevent him from so answering (SF 386). Instead, he would answer the special issues "no" to insure that the defendant would not receive the death penalty (SF 386-387). There was no set of circumstances or set of facts which would change his mind (SF 388-389). Upon examination by the defense, Tillman iterated that he could not answer the issues in the affirmative, even if the evidence mandated it (SF 388-389). Although Tillman equivocated several times during the thorough and detailed voir dire examination (SF 373-74, 390, 391, 393), his final answers made unequivocal that, by his answers to the special issues, he could not ever, under any facts or circumstances, follow the law or vote for the imposition of the death penalty (SF 391, 394). Finally, he testified that, no matter what the evidence revealed, he would automatically vote

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2/ Article 37.07.(b)(1)(2), Vernon's Ann. C. C. P.

"no" to one of the special issues to prevent the imposition of the death penalty (SF 394).

Venireman Ogeal Criner first believed that she could answer the special issues in the affirmative, if the evidence so justified, knowing that a death sentence would result (SF 725). Her views, however, changed as the matter was explained further. She did not believe that anyone had the power to take a life (SF 726), and her conscience would prohibit her from answering the issues "yes", even if the evidence supported that answer, knowing that the death penalty would result (SF 728). She maintained that no matter what the evidence showed, she would always vote "no" to avoid the death penalty (SF 728). The serious penalty would affect her deliberations to the extent that she would vote so as to avoid death (SF 729). Finally, Criner maintained that "no matter how horrible the the circumstance" of the crime, she could not answer the issues "yes" even if the evidence "overwhelmingly" indicated an affirmative answer (SF 730).

Venireman Rosa Anderson (SF 1166-1167) testified that under no circumstances, no matter what facts, she could never participate in returning a death verdict (SF 1166, 1167). She reiterated that this was true no matter what circumstances (SF 1168). Although she then stated that she might be able to answer the questions in the affirmative if the evidence so justified (SF 1171, 1172, 1173), when it was explained what the effect of affirmative answers would be, she retracted her earlier statements (SF 1175). Thereafter, she steadfastly maintained that she would automatically vote against the imposition of the death penalty, no matter what the circumstances or facts (SF 1175, 1176).

Venireman Mary Oligney first equivocated several times regarding whether she ever could answer the special issues affirmatively, knowing that the death penalty would be imposed (SF 1273-1285). Upon continued questioning and efforts by the court and the parties to ascertain unequivocal answers, she testified that she would answer one of the special issues in such a way as

to insure that the defendant received a life sentence rather than death (SF 1288), and that she could not vote for the imposition of death regardless of the facts (SF 1288). She iterated that she would answer the questions not on the evidence but to avoid the death penalty (SF 1289). She could not imagine any set of facts which would change her mind or circumstances where she could answer both special issues "yes" (SF 1292), and in every case, regardless of the facts or how horrible the case, she would vote against the imposition of death (SF 1292).

Because each of the four veniremen finally voiced unequivocal and unambiguous resolve to vote against the imposition of the death penalty no matter what the case or evidence at trial, their exclusion for cause did not violate the doctrine of Witherspoon v. Illinois, 391 U.S. at 522, n.21. 3/

III.

THE DENIAL OF PETITIONER'S CHALLENGE FOR CAUSE TO VENIREMAN WAGNER DID NOT VIOLATE HIS RIGHT TO AN IMPARTIAL TRIAL AS THE VENIREMAN TESTIFIED THAT SHE COULD CONSIDER THE FULL RANGE OF PUNISHMENT.

Petitioner complains of the trial court's denial of his challenge for cause to veniremen Wagner, alleging that Wagner stated that she would impose the death penalty in all capital convictions and could not consider probation for a murder offense. The record of the voir dire examination of Wagner does not support these claims. 4/

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3/ Contrary to Petitioner's assertions, these veniremen were not excused pursuant to V.T.C.A. Penal Code Section 12.31(b) held unconstitutionally broad in Adams v. Texas, 448 U.S. 38 (1980).

4/ Further, this Court should refuse to consider Petitioner's contention regarding Wagner's alleged refusal to consider probation. As found by the Court of Criminal Appeals, Petitioner failed to raise this objection in the trial court; thus, the appellate court refused to review the merits of this contention. Williams v. State, 622 S.W.2d at 119. This procedural default constitutes an adequate and independent ground of decision barring review. Michigan v. Tyler, 436 U.S. 499 n.7 (1978).

Venireman Wagner was thoroughly examined both by the trial court and the parties, and her recitations, as reflected by the record, establish that she was not subject to a challenge for cause and that she could be a fair and impartial juror. Wagner testified that if the evidence were not sufficient to support the special issues, she would vote "no" (SF 1581-1582); she would not vote to convict unless the elements of the offense were proven beyond a reasonable doubt (SF 1594-1596). Although Wagner stated that she favored capital punishment (SF 1570), her entire voir dire examination reveals that she could be fair and impartial both on the issues of guilt and punishment, and would follow the law. As such, she was not subject to a challenge for cause and the trial court's refusal to sustain Petitioner's challenge did not deprive him of any constitutional guarantee.

IV.

THIS COURT SHOULD REFUSE TO CONSIDER A MATTER TO WHICH THE STATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW.

Petitioner contends that the Texas capital sentencing statute, Article 37.071, Vernon's Ann. C. C. P. is unconstitutional because it fails to direct the jury to consider mitigating circumstances at the punishment phase of the trial. Petitioner raised this contention in his direct appeal and the state appellate court found:

> The appellant has failed to preserve the error now asserted on appeal. No objection to the court's charge or special requested instruction was filed. Article 36.14 & 36.15, V.A.C.C.P. Absent such an objection or requested instruction, the trial court's failure to charge the jury as to the consideration of mitigating circumstances was not reversible error.

Williams v. State, 622 S.W.2d at 120.

This Court consistently has declined to review matters to which no proper objection was made at trial in compliance with state procedural requirements. The failure of a defendant to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court. Michigan v. Tyler, 436 U.S. 499

n.7 (1978). That the state has a legitimate interest in requiring the parties to apprise the trial court of their grounds for complaint is well settled. See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973). The state's legitimate interest in this procedural rule is evident in the instant case where, if Petitioner desired an additional instruction, he should have requested such at the time the instructions were submitted to the jury. Having failed to make this request in the trial court, Petitioner should not be heard to now complain.

Further, this Court previously has rejected this contention on the merits. In Jurek v. Texas, 428 U.S. 262 (1976), the Texas death penalty statutes were upheld as constitutional. This Court held that:

> Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that ... the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death. (emphasis added).

428 U.S. at 273. The Court continued in stating that:

> [b]y authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function.

428 U.S. at 276.

In Lockett v. Ohio, 438 U.S. 586 (1978) the Court recognized the "facial narrowness" of Texas' Article 37.071, supra, but concluded that the Court of Criminal Appeals "had broadly interpreted the second question ... so as to permit the sentencer to consider whatever mitigating circumstances the defendant might be able to show." 438 U.S. at 607.

This Court should refuse to review this ground.

## CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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